SURUHANJAYA SEKURITI MALAYSIA
v. DATO' AMINUDDIN MD DESA

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN WAN YAHYA J
[CIVIL SUIT NO: WA-22NCC-573-12-2021]
13 MARCH 2025

Abstract – *(i) Under s. 188(2)(a) or (b) of the Capital Markets and Services Act 2007 ('CMSA'), a person is liable for insider trading if: (a) they are an 'insider' as defined by s. 188(1) of the CMSA, meaning they possess information that is: (1) not generally available; (2) expected by a reasonable person to have a material effect on the price or value of securities if it becomes generally available; and (3) known, or ought reasonably to be known, by the person to be not generally available; and (b) while possessing such inside information, they either: (1) acquire or dispose of, or enter into an agreement for the acquisition or disposal of, those securities; or (2) procure another person to acquire or dispose of, or enter into an agreement for the acquisition or disposal of, those securities. 'Procurement' includes direct forms of incitement, inducement, encouragement, or direction, such as providing funds to enable the acquisition.*

SECURITIES: *Shares – Insider trading – Allegations of contravention of insider trading prohibitions – Acquisition of shares whilst in possession of inside information – Whether alleged perpetrator 'insider' within meaning of s. 188(1) of Capital Markets and Services Act 2007 ('CMSA') in relation to inside information – Whether there was breach of s. 188(2)(a) of CMSA – Whether perpetrator had directly or indirectly, procured another individual, including but not limited to, inciting, inducing, encouraging and/or causing latter to acquire shares, in breach of s. 188(2) of CMSA – Whether perpetrator's 'no case to answer' entitled court to draw adverse inference against him*

Perak Corporation Bhd ('PCB') was founded in 1991 and Perbadanan Kemajuan Negeri Perak ('PKNP') was the ultimate holding corporation and the single largest shareholder in PCB. The defendant was appointed as the Chief Executive Officer ('CEO') of PKNP and, concurrently, he was also appointed as the Group CEO of PCB. The defendant brought one Dato' Jamal Mohd Aris ('Jamal'), his long-time close friend, into the PKNP Group of Companies. In early 2013, PKNP, with the defendant as a key leader, began collaborating with Affin Investment Bank to restructure the PKNP Group, including the privatisation of PCB. The defendant was central to these discussions and approvals. In August 2013, Affin Investment and Affin Bank jointly offered PCB a RM160 million term loan to partly finance the

privatisation costs. Crucially, on the same day, Affin Bank offered the defendant a RM1 million overdraft facility. Despite the defendant stating its purpose was for a bungalow construction, Affin Bank's internal risk management department initially rejected it, recommending a more suitable 'Affin Home Build' product with a lower interest rate and stricter documentation requirements. The overdraft was eventually approved. The proposed selective capital reduction ('SCR') for PCB was formally approved during a PKNP Board meeting. The Board explicitly authorised the defendant and other officers to finalise and execute all aspects of the SCR, including setting the offer price within a range of RM3.40 to RM4.27 per share. Immediately after this meeting, starting October 2013, and continuing until January 2014, Jamal systematically acquired 1,392,700 PCB shares for over RM4.2 million. The Securities Commission Malaysia ('plaintiff') alleged that the defendant used his newly acquired overdraft facility to provide RM600,000 of the funding for Jamal's acquisitions. In January 2014, PKNP requested Bursa Malaysia to suspend trading of PCB shares due to a 'material corporate exercise'. This request, and the subsequent announcement of the suspension, were signed by the defendant as the CEO of PCB. Two days later, PCB publicly announced the proposed SCR at RM3.90 per share, making the 'inside information' generally available. The announcement led to an immediate increase in PCB's share price. Following the public announcement, Jamal disposed of all his PCB shares, realising substantial gains. Between January and March 2014, Jamal remitted a total of RM900,730 to the defendant, which the plaintiff claimed resulted in a net gain of RM300,730 for the defendant, after accounting for his alleged initial funding of RM600,000 to Jamal. The sequence of events above triggered an investigation, leading to a regulatory settlement between the plaintiff and Jamal and an action filed by the plaintiff against the defendant. The plaintiff's claim was that the defendant had, whilst in possession of inside information, jointly acquired shares in PCB with Jamal, in contravention of s. 188(2)(a) of the Capital Markets and Services Act 2007 ('CMSA'). Alternatively, the plaintiff claimed that the defendant had procured Jamal to acquire the said shares in contravention of s. 188(2)(b) of the CMSA. At the end of the plaintiff's case, the defendant submitted a 'no case to answer'.

Held (allowing claim):

(1) To determine whether the defendant was an 'insider' within the meaning of s. 188(1) of the CMSA, two elements must be satisfied: (i) the defendant possessed information that was not generally available which, on becoming generally available, a reasonable person would expect it to have a material effect on the price or the value of securities; and (ii) the defendant knew or ought to reasonably know that the information was not generally available. Based on the evidence adduced, both elements were satisfied. The defendant was an 'insider' within the meaning of s. 188(1) of the CMSA. (paras 72, 73 & 88)

(2) There was an uncanny connection and inextricable link between the defendant and Jamal in the acquisition of the PCB shares as: (i) Jamal did not have access to the inside information other than from the defendant; (ii) there was a close relationship between the defendant and Jamal. They had been friends for almost 33 years when they joined PKNP; (iii) the defendant attempted to conceal his trading *modus operandi* and true relationship with Jamal. His conduct was more consistent with a person who had engaged in insider trading; (iv) there was joint funding by the defendant and Jamal for the PCB shares; (v) the defendant's use of the funds for purposes other than intended, combined with the timing of the overdraft facility application, aligning with significant events related to the proposed SCR, made it evident that the defendant deliberately planned to use the funds to finance the impugned acquisition; (vi) Jamal knew as to when the proposed SCR would be announced because it was part of the arrangement that he had with the defendant, which was to jointly acquire the PCB shares or for the defendant to procure Jamal to acquire the PCB shares, whilst in possession of the inside information. There was also a joint benefit between the defendant and Jamal; and (vii) there were proximity of calls between the defendant and Jamal relating to the impugned acquisition. (paras 92, 93, 100, 104, 120, 131, 134 & 137)

(3) The defendant had communicated the inside information to Jamal and provided funding to Jamal, which enabled Jamal to acquire the PCB shares. The provision of funds from the defendant to Jamal was a form of procurement as it was a direct form of incitement, inducement, encouragement, or direction within the meaning of s. 187 of the CMSA. Even if the court was wrong in finding that the defendant had jointly acquired PCB shares with Jamal, it was still the court's finding that the defendant had procured Jamal to acquire the PCB shares in contravention of s. 188(2)(b) of the CMSA. (paras 146 & 147)

(4) The consequence of the defendant's election of 'no case to answer' was that the defendant refused to give evidence. The failure of the defendant to give evidence discredited his case and strengthened the plaintiff's case on those vital points at the axis of the dispute between the parties, namely: (i) the purpose and timing of the defendant's payment to Jamal and *vice versa*; (ii) the issuance of the RM100,000 cheque by the defendant to RIB; (iii) the defendant's trading *modus operandi*; (iv) the defendant's reason for not stating in his application for the overdraft facility that the purpose of the facility was for his alleged investment in Jamal's family's Cherating resort; (v) why the defendant applied for the overdraft facility when the Affin Home Build product was a cheaper option and catered specifically for the purpose of his application; (vi) when the defendant's bungalow was built and by what means; (vii) the improbability that the payment to Jamal had anything to do

with his investment in Cherating resort; and (viii) the proximity of the phone calls between the defendant and Jamal and Jamal's trades in PCB shares. The above were all vital matters within the knowledge of the defendant, which required his explanation. The court was entitled to draw an adverse inference against him on each and every one of these issues. (paras 148-150)

(5) The plaintiff's claim was allowed and the following orders were granted: (i) a declaration that the defendant had breached s. 188(2)(a) of the CMSA; (ii) that the defendant pays the sum of RM2,466,229.20; (iii) that the defendant pays a civil penalty of RM1,000,000; (iv) that the defendant be barred from becoming a CEO or director of any public-listed company and/or any subsidiary of a public-listed company, for a period of five years from the date of this judgment under s. 360(1)(a)(L) of the CMSA; (v) the defendant be barred from being involved in the management of any public-listed company and/or any subsidiary of a public-listed company, whether directly or indirectly, for a period of five years from the date of this judgment under s. 360(1)(a)(L) of the CMSA; (vi) the defendant was restrained, whether by himself, his agent or otherwise howsoever, from trading in any counter on Bursa Malaysia for a period of five years from the date of this judgment; (vii) that the defendant pays interest at the rate of 5% per annum on the judgment sum from the date of judgment to full realisation thereof; and (viii) that the defendant pays cost of RM100,000 subject to the payment of allocator fee. (para 206)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Bagot v. Easton (1877) 7 Ch D 1 ***(refd)***

eSys Technologies Pte Ltd v. Tan Corporate Advisory Pte Ltd [2013] SGCA 27 ***(refd)***

Finkelstein v. Ontario (Securities Commission) [2018] OJ No. 489 ***(refd)***

Fisher v. Brooker [2009] 4 All ER 789 ***(refd)***

Lei Lin Thai v. PP [2016] 7 CLJ 222 HC ***(refd)***

Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd [2009] 10 CLJ 234 HC ***(refd)***

Ng Chee Weng v. Lim Jit Ming Bryan & Another [2011] SGCA 62 ***(refd)***

PP v. Chua Seng Huat [1999] 6 CLJ 590 HC ***(refd)***

Public Bank Bhd v. Paramjit Singh Gill [2014] 8 CLJ 218 CA ***(refd)***

R v. Glynatsis [2012] NSWSC 1551 ***(refd)***

Re Azeff [2015] OSCB 2983 ***(refd)***

Securities Commission Malaysia v. Toh Kai Fatt [2023] 9 CLJ 130 HC ***(refd)***

SFC v. Young Bik Fung & Ors [2018] 1 HKC 24676 ***(refd)***

Solsis (M) Sdn Bhd v. Kenny Woo B'ng Tat & Anor [2019] CLJU 2173; [2019] 1 LNS 2173 HC ***(refd)***

Suruhanjaya Sekuriti Malaysia v. Chan Soon Huat [2017] CLJU 2175; [2017] 1 LNS 2175 HC ***(refd)***

Suruhanjaya Sekuriti Malaysia v. Lim Kok Boon & Anor [2019] CLJU 1269; [2019] 1 LNS 1269 HC ***(refd)***
Suruhanjaya Sekuriti Malaysia v. Sreesanthan Eliathamby [2021] 7 CLJ 913 HC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors [2016] 3 CLJ 84 CA ***(refd)***
Tang Man Sit v. Capacious Investment Ltd [1996] 1 All ER 193 ***(refd)***
Techbay Sdn Bhd & Ors v. Medicbilt Sdn Bhd & Another Appeal [2019] CLJU 361; [2019] 1 LNS 361 CA ***(refd)***
The Securities And Futures Commission v. Young Bik Fung & Ors [2016] HKCU 116 ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, ss. 2, 134, 174, 183, 185, 187, 188(1), (2)(a), (b), (4), 201(5)(a), (b), (6), 360(1)(a)(L)
Evidence Act 1950, s. 114(g)
Rules of Court 2012, O. 18 r. 10(2)

For the plaintiff - Benjamin John Dawson, Eileen Othman, Tan Hui Ru & Niisha Lakshme Muthuvelu Mahathavan; M/s Benjamin Dawson
For the defendant - V Rajadevan & Fathin Delila Hamdan; M/s Rajadevan & Assocs
Representatives of the Securities Commission Malaysia - Mohd Aerie Rahman, Raihana Nadhira Rafidi & Jonathan Chin Ter Yang

Reported by Lina E

JUDGMENT

Wan Muhammad Amin Wan Yahya J:

[1] This was a civil action brought by the plaintiff, Securities Commission Malaysia, against the defendant, Dato' Aminuddin bin Md Desa, for contravening the insider trading prohibitions under the Capital Markets and Services Act 2007 ("CMSA").

[2] The plaintiff's claim is that the defendant had, whilst in possession of inside information, jointly acquired shares in Perak Corporation Berhad ("PCB") with one Dato' Jamal bin Mohd Aris ("Jamal"), in contravention of s. 188(2)(a) of the CMSA. Alternatively, the plaintiff claimed that the defendant had procured Jamal to acquire the said shares in contravention of s. 188(2)(b) of the CMSA.

[3] The plaintiff sought, *inter alia*, a declaration that the defendant has contravened either s. 188(2)(a) or s. 188(2)(b) of the CMSA, three times disgorgement in the sum of RM2,466,229.20, a civil penalty of RM1,000,000 and other consequential orders.

[4] At the conclusion of the plaintiff's case, the defendant elected not to give evidence and submitted a "no case to answer". Hence, the defendant presented no countervailing evidence to rebut the plaintiff's case.

[5] The trial took three days, and a total of seven witnesses testified for the plaintiff. The details of these witnesses are as follows:

(i) Hashimawati Hamzah (PW1) – Credit Manager of Affin Bank Berhad;

(ii) Ridzal Mohd Miswan (PW2) – Team Lead, Account Maintenance, Group Wholesale Banking of RHB Investment Bank Berhad ("RIB");

(iii) Yeoh Yong Cheng (PW3) – Team Lead, Margin Financing Evaluation & Monitoring of RIB;

(iv) Lee Wei Seong (PW4) – Team Lead, Equities Trade Support and Settlement of RIB;

(v) Ng Kem Yoke (PW5) – Team Lead of Remittance Unit & Security Operations of RIB;

(vi) Sayed Sharifuddin bin Sayed Shamsuddin (PW6) – Former General Manager of Government Relations and Corporate Affairs of Perak Corporation Berhad ("PKNP");

(vii) Danny Shamizi Teh bin Ismawi (PW7) – investigating officer at the Securities Commission.

[6] After careful consideration of the evidence before me and the written and oral submissions of both parties, I found in favour of the plaintiff. I set forth the reasons for my decision.

Salient Background Facts

[7] The facts of this case are largely undisputed. I shall begin by setting out the chronology of events leading to this action.

Perak Corporation Berhad ("PKNP")

[8] PCB was founded in 1991. On 13 November 2003, PCB was listed on the Second Board of Bursa Malaysia and subsequently, on 5 December 2003, PCB's listing status was transferred to the Main Board of Bursa Malaysia.

[9] At the material time, PCB's core business was township development of real property and ancillary services, maritime services, and sales of port-related land.

[10] Between 1 January 2013 and 31 December 2014, Perbadanan Kemajuan Negeri Perak ("PKNP") was the ultimate holding corporation of PCB and the single largest shareholder in PCB, holding approximately 52.9% of the issued and paid-up share capital in PCB. This shareholding comprised of PKNP's own shareholding of 52.27% and a further 0.63% held through its three wholly-owned subsidiaries, namely Fast Continent Sdn Bhd, Cherry Blossom Sdn Bhd, and Perak Equity Sdn Bhd (collectively "the subsidiaries").

The Appointment Of The Defendant

[11] On 1 February 2013, the defendant was appointed as the Chief Executive Officer ("CEO") of PKNP. Concurrently, he was also appointed as the Group CEO of PCB. Subsequently, on 27 February 2013, the defendant was appointed a Non-Independent Director of PCB. The defendant continued to hold these positions throughout 2014.

[12] The defendant is a highly educated and experienced individual. Prior to his appointments at PKNP and PCB, he held senior positions in insurance companies and was the Chief Financial Officer and subsequently, the Acting Chief Executive Officer of Malayan Banking Berhad.

Jamal's Appointment

[13] Jamal was appointed as the Deputy Chief Executive Officer of PCB effective from 1 July 2013. The letter of offer was signed by the defendant as the Group CEO of PCB. Subsequently, on 1 July 2013, Jamal was re-designated as the Senior General Manager, Business Operations of PCB. Again, this letter was signed by the defendant.

[14] On 29 August 2013, Jamal was appointed to the Board of Directors of Majuperak Holdings Berhad, a company in which PKNP was a major shareholder.

[15] On 18 October 2013, Jamal was placed by PCB in PKNP under PCB's "Cross Fertilisation Programme" effective until 30 June 2015. On the same date, Jamal assumed the post of Deputy Chief Executive Officer of Business Operations of PKNP, although his appointment was not formally tabled to the Board of Directors of PKNP.

[16] It is not in dispute that the defendant and Jamal shared a close relationship, being long-time college friends from the time they studied together at Institut Teknologi Mara in Arau, Perlis. Indeed, it was the defendant who brought Jamal into the PKNP Group of Companies in 2013.

Events Leading To The Proposed Selective Capital Reduction

[17] In March 2013, a discussion was held between the representatives of PKNP, including the defendant, and Affin Investment Bank Berhad ("Affin Investment") to discuss plans to restructure the PKNP Group of Companies and Affin Investment's role in the same.

[18] On 4 April 2013, PKNP agreed to appoint Affin Investment as the Adviser to PKNP for the Proposed Restructuring and Rationalisation of the PKNP Group, subject to the terms and conditions of Affin Investment's letter of offer dated 2 April 2013 ("LO1"). Among the corporate exercises contemplated in LO1 was the proposed privatisation of PCB by way of selective capital reduction take-over offer, or major disposal. LO1 was marked for the attention of the defendant.

[19] On 20 June 2013, the Board of Directors of PKNP had a meeting with the then senior management of PKNP as well as representatives from Affin Investment. The members of the senior management of PKNP who participated in this meeting included the defendant as the head of the senior management, Rozahan bin Osman, Mohd Badrillan bin Abdullah, Sayed Shariffuddin bin Sayed Shamshuddin ("PW6"), and Abdul Qadir bin Mohd Aros.

[20] At this meeting, the parties discussed, among other things, the proposed restructuring of the corporate structure of the PKNP Group, including the restructuring of PCB's corporate structure and business model that would place PCB as an investment holding company within the PKNP Group. Pursuant to this meeting, the Board of Directors of PKNP resolved *inter alia*:

(i) to approve the proposed privatisation of PCB at an indicative price of RM4.01 per share with a variance of 5% reduction/increase subject to adjustment and review by the management of PKNP; and

(ii) to approve the granting of a mandate to the management of PKNP to obtain financing, formally appoint advisers, and undertake all necessary steps in respect of the proposed privatisation of PCB.

[21] On 5 July 2013, Affin Investment issued a further letter of offer ("LO2") to PKNP, which was accepted by the defendant on behalf of PKNP on 11 July 2013. Pursuant to LO2, Affin Investment offered to act as the Principal Adviser to PKNP for the proposed privatisation of PCB by way of selective capital reduction and repayment exercise under s. 64 of the Companies Act 1965 ("proposed SCR"). LO2 was marked for the attention of the defendant.

[22] On 3 August 2013, the defendant paid RM2,000 as a deposit for a BMW car worth RM242,894.

[23] On 15 August 2013, Affin Investment issued a letter of offer to PCB ("TL LO") for a term loan facility of RM160 million granted jointly by Affin Investment and Affin Bank Berhad ("Affin Bank") to be utilised by PCB to, *inter alia*, part-finance the costs in relation to the proposed SCR. TL LO was also marked for the attention of the defendant.

[24] On the same day, 15 August 2013, Affin Bank issued a letter of offer for an overdraft facility to the defendant with a facility limit of RM1 million ("overdraft facility"). According to PW1, the Credit Manager of Affin Bank who was involved in the processing of the overdraft facility, the following facts were established:

(i) the defendant applied for the overdraft facility sometime in late July 2013. The purported purpose of the overdraft facility, as represented by the defendant, was for the construction of a bungalow.

(ii) in his application for the overdraft facility, the defendant did not mention that the purpose of the facility was to invest in the Cherating Bayview Resort Sdn Bhd.

(iii) the overdraft facility had a higher interest rate of 7.35% calculated on a daily basis, compared to another product that Affin Bank offered which was specifically for the construction of homes, being Affin Home Build, which was at 4.6% per annum.

(iv) Affin Home Build required supporting documents before the funds were disbursed for utilisation. This was a more stringent requirement compared to the overdraft facility, which did not require any supporting documents for disbursements.

(v) Affin Bank's Group Risk Management Department did not support the defendant's application for the overdraft facility as the application should have come under Affin Home Build instead. The defendant's application was declined by Affin Bank's Group Chief Risk Officer.

(vi) however, pursuant to an appeal by Affin Bank's Branch Manager, the overdraft facility was approved.

PKNP Board Meeting On 3 October 2013 To Approve The Proposed SCR

[25] On 3 October 2013, the Board of Directors of PKNP and members of PKNP's senior management had a further meeting to discuss the proposed SCR ("3 October 2013 board meeting"). Given the sensitivity of the proposed SCR, when it was to be deliberated, all parties who were not involved in the proposed SCR were asked to leave the room. Those who remained included the defendant and PW6.

[26] At this meeting, the Board of Directors of PKNP resolved *inter alia*:

(i) to approve the proposed SCR which will result in PKNP and the subsidiaries collectively holding the entire issued and paid-up share capital of PCB upon completion of the proposed SCR;

(ii) that the defendant, as the Chief Executive of PKNP, and other officers are authorised to finalise, approve, amend, alter, vary, and modify the terms and conditions of the SCR offer letter and to execute and instruct for and on behalf of PKNP all documents pertaining to the proposed SCR; and

(iii) to approve granting a mandate to the management of PKNP to execute the approved proposed SCR at any time suitable and at any proposed SCR offer price within the range between RM3.40 and RM4.27 per share.

[27] The 3 October 2013 board meeting is critical because this is when the inside information, being the Proposed SCR, had "crystallised". Prior to the 3 October 2013 board meeting, there were discussions with Affin Investment and PKNP's senior management on the proposed SCR. However, until the 3 October 2013 board meeting, there was no formal authorisation from the PKNP Board to pave the way for the realisation of the proposed SCR.

[28] The inside information is information relating to or concerning the proposed SCR, including the developments and/or progress thereto between 3 October 2013 and 3 January 2014. ("the inside information") (para. 23 of the statement of agreed facts).

[29] With the PKNP Board's approval, the proposed SCR moved toward becoming a reality. As the mandate was granted, it was left to the defendant to fix the offer price and find a suitable time to make the announcement on Bursa Malaysia.

Jamal's Acquisition Of PCB Shares And The Defendant's Involvement

[30] On 4 October 2013, a day after the 3 October 2013 Board Meeting, Jamal made his first acquisition of PCB shares, where he acquired 20,000 PCB shares at RM2.89 per share, paying RM57,900.

[31] Jamal continued to acquire 1,392,700 PCB shares between 5 October 2013 and 3 January 2014 at a price range of RM2.89 to RM3.20 per share. Jamal spent a total of RM4,233,997.60 for these acquisitions. The funding of the acquisition of PCB shares in the period between 4 October 2013 and 3 January 2014 ("impugned acquisition") was undertaken *via* Jamal's CDS accounts, which were maintained with OSK Securities Berhad (now known as RHB Investment Bank Berhad ("RIB")).

[32] The plaintiff contends that the funding structure for the impugned acquisitions was as follows:

(i) the defendant utilised his overdraft facility by remitting the following sums to Jamal, which Jamal used to acquire the PCB shares:

(a) on 18 October 2013, the sum of RM500,000 was remitted by cheque to Jamal's Citibank account.

(b) on 31 December 2013, the sum of RM100,000 was remitted by cheque to Jamal's margin trading account with RIB.

(ii) Jamal utilised RM70,157.20 of his own cash to acquire PCB shares. Jamal also utilised RM3,621,740.40 from his margin facility and contra trades under his margin trading account to acquire the PCB shares.

[33] Further, on 18 October 2013, the defendant completed his acquisition of a BMW car for his wife by remitting the sum of RM240,894 to the car dealer.

Events Leading To The Announcement Of The Proposed SCR

[34] On 2 January 2014, the Board of Directors of each of the subsidiaries resolved *via* three Directors' Circular Resolution to, *inter alia*:

(i) approve the undertaking of the proposed SCR which will result in PKNP and the subsidiaries holding the entire issued and paid-up share capital of PCB upon completion of the proposed SCR; and

(ii) authorise PKNP to serve the letter of offer on behalf of the subsidiaries to request PCB to undertake the proposed SCR.

[35] On 3 January 2014, PKNP, on behalf of itself and its subsidiaries, issued a letter to the Board of Directors of PCB requesting that PCB make the necessary application to Bursa Malaysia to request the suspension of trading in the securities of PCB from 9am to 5pm on 6 January 2014 due to a material corporate exercise between PCB and the non-entitled shareholders (being PKNP and the subsidiaries) which was currently being finalised.

[36] On the same date, PCB emailed a letter to the listing Department of Bursa Malaysia enclosing a "request for suspension form" under Annexure PN2A of the main market listing requirements. Pursuant to this letter, PCB requested the suspension of trading of PCB shares for one market day from 9am to 5pm on 6 January 2014, pending the release of material information. Both the said letter and the "request for suspension form" were signed by the defendant as the CEO of PCB.

[37] Also on 3 January 2014, PCB announced to Bursa Malaysia that it had requested the suspension of trading of its securities for one market day (from 9am to 5pm on 6 January 2014) pending the release of a material announcement.

[38] On 6 January 2014, PCB made an announcement to Bursa Malaysia ("the announcement") that its Board of Directors had, on the same date, received a letter from PKNP and the subsidiaries requesting PCB to undertake the proposed SCR. A copy of the offer letter was also made available *via* this announcement. Pursuant to the proposed SCR offer, the entitled shareholders of PCB would receive a total cash payment of approximately RM183,696,228, which represents a cash amount of RM3.90 per PCB share. The inside information thus became generally available within the meaning of s. 174 of the CMSA.

[39] With the announcement of the proposed SCR, the share price of PCB increased from RM3.49 on 3 January 2014 to RM3.62 on 7 January 2014.

[40] On 6 January 2014, Bursa Malaysia announced *via* Listing Circular No. L/Q 69605 of 2014 that trading in PCB's shares would resume with effect from 9am, Tuesday, 7 January 2014.

A **Disposal Of PCB Shares By Jamal**

[41] Subsequent to the announcement of the proposed SCR on Bursa Malaysia, Jamal disposed of all his PCB shares and realised substantial gains. These gains were apportioned to the defendant in the following manner:

B (i) Jamal's disposal of all PCB shares led to him receiving RM1,418,528.82 from RIB.

(ii) of this sum, Jamal remitted a total of RM900,730 to the defendant as follows:

C (a) 30 January 2014 – RM194,000;

(b) 12 February 2014 – RM300,000;

(c) 3 March 2014 – RM300,000;

(d) 3 March 2014 – RM106,730.

D **[42]** The plaintiff contends that given that the defendant had earlier remitted a total of RM600,000 to Jamal for the acquisition of the PCB shares, the receipt of RM900,730 would mean that the defendant enjoyed a gain of RM300,730.

The Investigation And Regulatory Settlement

E **[43]** The plaintiff commenced its investigation in 2015 and subsequently issued a letter of demand to the defendant dated 11 August 2021 demanding, *inter alia*, payment of the sum of RM2,875,729.20 from the defendant, being the sum of RM2,466,229.20 together with a civil penalty of RM409,500 within 14 days of the date of the letter of demand.

F **[44]** Through a letter dated 8 September 2021 by his solicitors, Messrs Rajadevan & Associates, the defendant denied the plaintiff's claim and refused to settle the plaintiff's demand.

[45] On 28 October 2021, the plaintiff and Jamal entered a regulatory G settlement agreement ("RSA"). Under the RSA, Jamal agreed to pay RM1,644,152.80 to settle the intended civil action by the plaintiff against him.

[46] On 31 December 2021, the plaintiff filed this action against the H defendant.

Issues For Determination

[47] The issues to be determined in this case are as follows:

(i) whether the defendant is an "insider" within the meaning of s. 188(1) I of the CMSA in relation to the inside information.

(ii) if the answer to question (i) above is in the affirmative, whether:

(a) by acquiring the shares jointly with Jamal *via* the CDS accounts, the defendant had breached s. 188(2)(a) of the CMSA; or

(b) in the alternative, whether the defendant had directly or indirectly, procured Jamal, including but not limited to, inciting, inducing, encouraging, and/or causing Jamal to acquire the shares in breach of s. 188(2)(b) of the CMSA.

(iii) if the answer to question (ii) above is in the affirmative, the orders ought to be made against the defendant.

(iv) whether the plaintiff is prohibited by the doctrine of laches from making any claim against the defendant.

(v) whether as a senior officer in the PKNP Group of Companies, *ie*, PCB and PKNP, Jamal had personal access to the inside information.

(vi) whether the monies paid by the defendant to Jamal were for the purpose of investment in the resort business in Cherating which was owned by Jamal's family called Cherating Bayview Resort Sdn Bhd ("Cherating Resort").

(vii) whether the monies paid by Jamal to the defendant constitute repayment of the monies which had been invested by the defendant in the business of the resort.

(viii) whether the plaintiff has taken action against Jamal.

(ix) in the event the defendant's liability is proven, whether the regulatory settlement entered into between Jamal and the plaintiff has any impact or effect on the liability of the defendant.

(x) subject to question (ix) above, whether Jamal had settled the plaintiff's claim, and how much Jamal paid to the plaintiff.

The Plaintiff's Case

[48] The plaintiff's case is premised on the contention that the defendant, whilst in possession of inside information regarding the proposed SCR, had contravened s. 188(2)(a) of the CMSA by jointly acquiring PCB shares with Jamal. Alternatively, the plaintiff contends that the defendant had contravened s. 188(2)(b) of the CMSA by procuring Jamal to acquire the PCB shares.

[49] In this regard the plaintiff contends the following essential elements for a contravention of s. 188(2)(a) of the CMSA has been satisfied:

(i) the defendant was in possession of inside information, being the information relating to the proposed SCR;

(ii) the inside information was not generally available on the date of the impugned acquisition;

(iii) the defendant knew or ought reasonably to have known at that time when he undertook the impugned acquisition jointly with Jamal that the inside information was not generally available;

(iv) the inside information when it is generally available, is information that a reasonable person would expect to have a material effect on the price or the value of PCB shares;

(v) the defendant had undertaken the impugned acquisition jointly with Jamal whilst in possession of inside information; and

(vi) the PCB shares which were jointly acquired by the defendant and Jamal came within the definition of "securities".

[50] The plaintiff further contends that the essential ingredients for a contravention of s. 188(2)(b) of the CMSA are:

(i) the defendant had procured Jamal to undertake the impugned acquisition whilst he was in possession of inside information; and

(ii) all of the elements set out in paras. 49(ii) to (vi) above.

[51] The plaintiff relies on the following circumstantial evidence to establish that the defendant had traded in PCB shares whilst in possession of inside information:

(i) the close relationship between the defendant and Jamal;

(ii) the defendant and Jamal had jointly funded the acquisition of PCB shares;

(iii) the defendant and Jamal had jointly benefited from the sales proceeds of the PCB shares when they were subsequently disposed of by Jamal;

(iv) the timing and characteristics of Jamal's trading pattern, particularly in the period between 4 October 2013 and 3 January 2014;

(v) the proximity between the calls between the defendant and Jamal and the impugned acquisition; and

(vi) the defendant's obtaining of the overdraft facility to finance the joint acquisition.

[52] The plaintiff also highlights that this is not the first time the defendant has acquired shares through Jamal. The plaintiff refers to an email dated 20 September 2011 from Jamal to the defendant, which states that Jamal sold substantial SIGGAS shares on the defendant's behalf.

[53] The plaintiff contends that the Cherating Resort investment defence relied upon by the defendant is not credible. The plaintiff argues that the defendant wants the court to believe that he allegedly invested in Cherating

Resort on 18 October 2013 and 31 December 2013, and then received a windfall from Jamal immediately after the announcement of the proposed SCR.

[54] The plaintiff submits that by electing not to give evidence, the defendant has prevaricated at his peril. The plaintiff invites the court to draw an adverse inference against the defendant pursuant to s. 114(g) of the Evidence Act 1950.

[55] The plaintiff also contends that Jamal's regulatory settlement with the plaintiff does no affect on the defendant's liability.

The Defendant's Case

[56] The defendant submits that there is no evidence that he acquired or disposed of shares in PCB. The defendant relies on the evidence of PW7, the investigating officer, who testified that there is no evidence of an agreement between Jamal and the defendant to buy and sell PCB shares.

[57] The defendant argues that the plaintiff has failed to particularise which limb under s. 188(2)(a) and 188(2)(b) of the CMSA he allegedly breached.

[58] The defendant contends that Jamal was a very senior ranking member of PKNP and PCB senior management. The defendant points to the attendance sheet of the Board of Directors Meeting on 3 October 2013, which shows Jamal's name and signature on the attendance list, to argue that Jamal had knowledge of the proposed SCR without the defendant having to communicate the same to him.

[59] The defendant also refers to an email dated 3 January 2014 that was copied to Jamal to argue that Jamal was kept in the loop regarding the proposed SCR.

[60] The defendant argues that the monies paid by him to Jamal and *vice versa* were for investment in the Cherating Resort. The defendant notes that this was made known to the plaintiff as early as 9 July 2018 when the plaintiff recorded his statement. The defendant also claims that his investment in Cherating Resort was declared to the Perak Government when he joined PKNP, a fact the plaintiff did not investigate.

[61] The defendant further contends that the profit-sharing ratio between him and Jamal does not indicate of insider trading. The defendant points out that Jamal, who invested RM71,000 cash, made a profit of RM1.4 million, whereas the defendant, who allegedly gave RM600,000 to Jamal, made a profit of only RM300,000. The defendant argues that if he was indeed the mastermind of the whole exercise, he would have made the RM1.4 million, not Jamal.

[62] The defendant also submits that the non-calling of Jamal as a witness by the plaintiff gives rise to an adverse inference under s. 114(g) of the Evidence Act 1950.

[63] Finally, the defendant argues that the plaintiff's decision to pursue civil remedies rather than criminal prosecution under s. 188(4) of the CMSA indicates the weakness of the plaintiff's case. The defendant contends that if the evidence of insider trading was strong, the plaintiff would have chosen to prosecute criminally, and the fact that they did not do so suggests they lacked confidence in meeting the higher standard of proof required in criminal proceedings.

The Governing Law

[64] The relevant provisions of the CMSA are as follows:

(i) Sections 188(1) of the CMSA:

> (1) A person is an **"insider"** if that person -
>
> (a) possesses information that is **not generally available** which **on becoming generally available** a reasonable person would expect it to have a **material effect on the price or the value of securities;** and
>
> (b) **knows or ought reasonably to know** that the information is **not generally available.**
>
> (emphasis added)

(ii) Sections 188(2) of the CMSA:

> (2) An insider shall not, whether as principal or agent, in respect of any securities **to which information in subsection (1) relates** -
>
> (a) **acquire or dispose** of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or
>
> (b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.
>
> (emphasis added)

(iii) Sections 187 of the CMSA:

> For the purposes of this Subdivision and section 201 but **without limiting the meaning** of the term **"procure"** as provided in this section, if a person **incites, induces, encourages or directs** an act or omission by another person, the first-mentioned person is deemed to procure the act or omission by the other person.
>
> (emphasis added)

[65] For a breach of s. 188(2)(a) of the CMSA it is not in dispute that the following elements need to be satisfied:

(i) the defendant was in possession of the information ("first element"); A

(ii) the information were not generally available ("second element");

(iii) the defendant knew or ought reasonably to have known that the information was not generally available ("third element");

(iv) if the information was generally available, a reasonable person would expect it to have a material effect on the price of securities ("fourth element"); B

(v) the defendant disposed of procured the disposal of shares whilst in possession of the information ("fifth element"). C

(see *Suruhanjaya Sekuriti Malaysia v. Sreesanthan Eliathamby* [2021] 7 CLJ 913).

[66] The standard of proof in a civil claim, even for a statutory claim for the contravention of the insider trading prohibitions, is on the balance of probabilities. In *Suruhanjaya Sekuriti Malaysia v. Chan Soon Huat* [2017] CLJU 2175; [2017] 1 LNS 2175 [2018] 9 MLJ 782, Abu Bakar Jais J (now FCJ) held that the plaintiff only needs to prove that it was at least 51% likely that the event had occurred. D

[67] Direct evidence is not required to prove communication of inside information. Circumstantial evidence suffices. In certain situations, direct evidence may not be available. This was observed in numerous cases relating to the communication of inside information, including in *Re Azeff* [2015] OSCB 2983, where it was held: E

> [43] *Circumstantial evidence is clearly admissible* (*Re Kusumoto*, 2007 ABASC 40 at paras. 73-74). It usually forms the bulk of the evidence in cases where insider trading and tipping is alleged. Some aspects of insider trading cases, such as the fiduciary duty and the duty not to disclose material nonpublic information, are relatively easy to prove. Other aspects, particularly tipping, are very difficult to prove as, *generally, the only persons who have direct knowledge of the relevant communications are the wrongdoers themselves. As a result, insider trading and tipping cases are often established by inferences drawn from indirect evidence. In this case, circumstantial evidence is the evidence of communication, the relationship between the parties, the knowledge that the tipper informant had, the knowledge the tippee had, the trading by the tippee and/or successive tippees and the timing and volume of the trades in relation to the initiating conversations and successive tips.* F G H
>
> [44] The Commission determined, in the circumstances of the Suman case, that:
>
> > *Knowledge of an undisclosed material fact may be properly inferred based on circumstantial evidence* that includes proof of the ability and opportunity to acquire the information combined with evidence of welltimed, highly uncharacteristic, risky and highly profitable trades. I
> >
> > (*Suman*, *supr*a at para. 307)

A [45] A variety of types of circumstantial evidence can be the indicia of insider trading or tipping:

(a) unusual trading patterns;

(b) a timely transaction in a stock shortly before a significant public announcement;

B

(c) a first time purchase of the stock;

(d) an abnormal concentration of trading by one brokerage firm or with one or a few brokers; and

(e) a trade that represents a very significant percentage of the particular C portfolio.

[46] *Motive and intent can also be weighed as facts when drawing inferences* whether it is more probable than not that the alleged offences occurred.

[47] The indicators listed in the paragraphs above are not exhaustive. Nor is it necessary that all indicia be established in every case. *Insider trading* D *and tipping cases are established by a mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not that the trader, tipper or tippee possessed or communicated material non-public information.* (emphasis added)

(see also *Suruhanjaya Sekuriti Malaysia v. Lim Kok Boon & Anor* [2019] CLJU E 1269; [2019] 1 LNS 1269 at paras. 32, 33 and *PP v. Chua Seng Huat* [1999] 6 CLJ 590 at pp. 617 to 618).

[68] The principle that circumstantial evidence can be better than direct evidence was affirmed in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors* [2016] 3 CLJ 84; [2015] MLJU 2111, where Abdul Aziz Abdul F Rahim JCA held:

[28] In our view all the above circumstances had overwhelmingly supported a case of a sham trust. We agree with the learned Judge that these are in the nature of circumstantial evidence. However, **it has been judicially recognized that circumstantial evidence are good evidence and** G **sometimes it can be better than direct evidence** (see *Prosecutor v. Sarjit Kaur a/p Najar Singh* [1988]1 MLJ 184, the Supreme Court Of India observed as follows:

> Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's H testimony which may be lacking in truth or accuracy. In circumstantial evidence. The motives or acts speak for themselves, sometimes louder than the words of witness, without any embellishment. (emphasis added)

[69] In addition, when a defendant elects not to give evidence, the court is I entitled to draw an adverse inference against him. In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751, the Federal Court held:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, *the evidence given by the appellant ought to have been presumed to be true.*
>
> ...
>
> [5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant fs contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. *Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference.* See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: *'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.'* (emphasis added)

[70] The Federal Court further held that:

> [6] In the present instance, *there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded.* Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence *apart from discrediting her case strengthened the appellant's case on those vital points* that lay at the axis of the dispute between the parties. (emphasis added)

[71] I shall now address each of the issues for determination in the present case.

Whether The Defendant Is An "Insider" Within The Meaning Of Section 188(1) Of The CMSA

[72] To determine whether the defendant is an "insider" within the meaning of s. 188(1) of the CMSA, two elements must be satisfied:

(i) the defendant possesses information that is not generally available which on becoming generally available, a reasonable person would expect it to have a material effect on the price or the value of securities; and

(ii) the defendant knows or ought reasonably to know that the information is not generally available.

[73] Based on the evidence adduced, I find that both elements were satisfied.

[74] At the material time, the defendant was the CEO of PKNP, the Group CEO of PCB, and the main person in charge of the proposed SCR. He had engaged with Affin Investment to secure their services as the advisor, security agent, and facility agent for the proposed SCR offer and to secure funding for the proposed SCR offer.

[75] From time to time, the defendant briefed the PKNP Board on the developments of the proposed SCR offer. He was later mandated by the PKNP Board to carry out the proposed SCR offer.

[76] In the defendant's s. 134 of the CMSA statement ('s. 134 statement'), the defendant admitted that he was the person in charge of and handled the proposed SCR offer corporate exercise.

[77] The defendant had participated in the discussions and key meetings with Affin Investment and PKNP's Board of Directors relating to the proposed SCR offer from its inception until its eventual announcement to Bursa Malaysia on 6 January 2014. Thus, the defendant was at all material times in possession of the inside information within the meaning of s. 183 of the CMSA.

[78] According to PW6, the defendant was the driver of the proposed SCR. The defendant was in the position to decide when the proposed SCR was to be undertaken following the authorisation given by the PKNP Board. PW6 also acted upon the defendant's instructions when PW6 signed the board resolutions of the PKNP subsidiaries to authorise the proposed SCR.

[79] It is an agreed fact that the defendant possessed the inside information, which was only made generally available on 6 January 2014 (paras. 6 to 24 of the statement of agreed facts). In insider trading parlance, the defendant is a "corporate insider".

The Inside Information Was Not Generally Available

[80] It is also an agreed fact that the proposed SCR was not generally available prior to PCB's Bursa Announcement on 6 January 2014 (paras. 6 to 24 of the statement of agreed facts).

[81] PKNP took various measures to ensure that the proposed SCR was safely guarded as follows:

(i) during the 3 October 2013 board meeting in which the defendant was present, those not involved in the proposed SCR were asked to leave when the proposed SCR was deliberated.

(ii) in the minutes of the 3 October 2013 board meeting, the board members were reminded of the confidentiality of this corporate exercise and were requested to avoid dealing in PCB shares.

[82] The measures undertaken by the Board of PKNP underscored the importance of preserving the confidentiality of the proposed SCR and support the fact that the proposed SCR was not generally available.

The Defendant Knew Or Ought Reasonably To Have Known That The Inside Information Was Not Generally Available

[83] As the defendant agreed that the inside information was not generally available prior to 6 January 2014, he clearly knew that the inside information was not generally available.

[84] The defendant knew all along the importance of safeguarding the confidentiality of this information. For this reason, he only involved a few people in the proposed SCR.

[85] The defendant was present at all material PKNP Board meetings, including the 3 October 2013 board meeting where all PKNP Board members were reminded of the strict confidentiality of the proposed SCR.

If The Inside Information Were Generally Available, A Reasonable Person Would Expect It To Have A Material Effect On The Price Of Securities

[86] Section 185 of the CMSA defines what constitutes "material effect on price or value of securities". Section 185 states:

> For the purposes of this Subdivision, an information that on becoming generally available would or would tend to have a material effect on the price or value of securities, refers to such information which would or would tend to, **on becoming generally available, influence reasonable persons who invest in securities in deciding whether or not to acquire or dispose of such securities,** or enter into an agreement with a view to acquire or dispose of such securities. (emphasis added)

[87] It is an agreed fact that the inside information is within the meaning of s. 185 of the CMSA, which means that the information would or would tend to have a material effect on the price or value of PCB shares.

[88] In view of the above, I find that the defendant was an "insider" within the meaning of s. 188(1) of the CMSA.

The Defendant Traded In The Securities In Which The Inside Information Relates Whilst In Possession Of Inside Information

Whether The Defendant Had Jointly Acquired PCB Shares With Jamal

[89] The plaintiff relies on the following circumstantial evidence in support of its claim:

(i) the close relationship between the defendant and Jamal ("the close relationship");

(ii) the defendant and Jamal had jointly funded the acquisition of the PCB shares ("joint funding");

(iii) the defendant and Jamal had jointly benefited from the sales proceeds of the PCB Shares when it was subsequently disposed of by Jamal ("joint benefit");

(iv) the timing and characteristics of Jamal's trading pattern, particularly in the period between 4 October 2013 and 3 January 2014 ("timing and trading pattern"); and

(v) the proximity between the calls between the defendant and Jamal and the impugned acquisition ("the proximity of calls").

[90] Therefore, the question is whether the defendant had jointly acquired PCB shares with Jamal whilst in possession of the inside information, thereby contravening s. 188(2)(a) of the CMSA.

[91] This question of fact must be determined based on the evidence adduced. As noted in *Chan Soon Huat* (*supra*), the following factors are relevant in determining whether a person had traded whilst in possession of inside information:

(i) the tippee's access to the information;

(ii) the relationship between the tipper and the tippee;

(iii) the timing of the contact between the tipper and the tippee;

(iv) the timing of the trades;

(v) the pattern of the trades, including the uncharacteristic size; and

(vi) the attempts to conceal the trades or the relationship between the tipper and the tippee.

[92] I find that the preponderance of probabilities disclosed by the facts of this case reveals an uncanny connection and an inextricable link between the defendant and Jamal in the acquisition of the PCB shares.

Jamal Did Not Have Access To The Inside Information – Jamal Was Not Present At The 3 October 2013 Meeting

[93] First, the evidence shows that Jamal did not have access to the inside information other than that of the defendant. In the defendant's s. 134 statement, he stated that as the proposed SCR offer was a sensitive and confidential matter until it was announced on Bursa Malaysia, only limited officers in PKNP and PCB were involved. The defendant admitted that Jamal was not involved at all in the proposed SCR offer and had not attended any meetings or discussions relating to the offer and that he would not be acquainted with the proposed SCR merely because of his position in PKNP. The relevant parts of the defendant's s. 134 statement are reproduced below:

Q: What is Jamal's Involvement in the proposed SCR exercise of PCB? A

A: **No, he was not involved in the SCR exercise at all.**

Q: Is it very likely that Jamal would have known about this SCR Corporate exercise even though he was not involved in the discussions and meetings on them? B

A: **No, it cannot be.** Not specifically that Perak Corp was to be privatised. **I don't think he would know at all.** If he did, it would not have been from me. (emphasis added)

[94] Jamal also did not attend the 3 October 2013 board meeting where the proposed SCR was discussed. This is confirmed by the minutes of the 3 October 213 board meeting, which was approved by the defendant. This was corroborated by PW6 who was present and responsible for taking down the attendance and minutes of PKNP's board meetings held on 3 October 2013. C

[95] The 3 October 2013 board meeting minutes is a Part A document. The truth and accuracy of its content are deemed admitted. The defendant cannot contradict its contents. As held in *Public Bank Bhd v. Paramjit Singh Gill* [2014] 8 CLJ 218; [2015] 1 MLJ 414 at para. 21, when a document is classified as a Part A document, the making, authenticity and contents of the document are admitted and not open to challenge. D E

[96] PW6's evidence on the preparation of the minutes of the 3 October 2013 board meeting remains unrebutted. During cross-examination, PW6 explained how the aforesaid minutes were prepared and that the defendant was given a draft of the entire minutes, which the defendant had approved. This included the names of the attendees in which Jamal was not present at the board meeting. F

[97] Although the defendant attempted to rely on an attendance list purportedly showing Jamal's signature, PW6 explained during cross-examination that a person can sign the attendance list without necessarily attending the meeting. The defendant's contention is further weakened by the fact that in his own s. 134 statement, he had stated that Jamal was not involved in the proposed SCR. G

[98] The defendant also attempted to rely on an email dated 3 January 2014 to Bursa Malaysia from PCB on the suspension of trading due to a material announcement, which was copied to Jamal. However, PW7 explained that this email was not about the privatisation of PCB but about the request for the suspension of PCB's securities on Bursa Malaysia. H

[99] Furthermore, the email was sent on 3 January 2014 at 5.04pm, when Jamal had already acquired all the PCB shares and the market had already closed. This was also confirmed by PW7. I

A *Close Relationship Between The Defendant And Jamal*

[100] Second, there is a close relationship between the defendant and Jamal. The defendant and Jamal had been friends for almost 33 years when they joined PKNP. They were long-time college friends from the time they studied together at Institut Teknologi Mara in Arau, Perlis. It is an agreed
B fact that the defendant and Jamal enjoyed a close relationship, even when they were at PKNP and PCB. The defendant was responsible for bringing Jamal into the PKNP Group of Companies in 2013 as stated in paras. 13 to 16 above.

C **[101]** This close relationship even extended into the realm of commerce. There was a deep mutual trust between the two of them as can be seen from the fact that the defendant and Jamal had an arrangement to purchase substantial SIGGAS shares where Jamal acquired the same, on behalf of the defendant. This was recorded in an email from Jamal to the defendant dated 20 September 2011.

D **[102]** Furthermore, the defendant and Jamal shared aspects relating to their finances, which are supposed to be private matters. The defendant was aware that Jamal had various trading facilities and Jamal was aware that the defendant had the overdraft facility.

E *Defendant's Attempt To Conceal His Trading Modus Operandi*

[103] Third, the defendant attempted to conceal his trading modus operandi. In the email dated 20 September 2011 from Jamal to the defendant, Jamal stated that he had sold SIGGAS shares on the defendant's behalf.

F **[104]** However, in his s. 134 statement to the plaintiff, the defendant sought to portray himself as someone who has little interest in the stock market and did not discuss trading in shares with Jamal. The defendant was clearly seeking to conceal his trading *modus operandi* and true relationship with Jamal. His conduct is more consistent with that of a person who had engaged in insider trading.

G *Joint Funding By The Defendant And Jamal For The PCB Shares*

[105] Fourth, there was joint funding by the defendant and Jamal for the PCB shares. The total purchase price for the impugned acquisition of the PCB shares was RM4,291,897.60. Of this sum, RM670,157.20 was paid in cash,
H with the defendant contributing RM600,000 and Jamal contributing RM70,157.20. The balance of the purchase price amounting to RM3,621,740.40 was financed by the margin facility and contra trades under Jamal's margin trading account.

I

[106] The defendant made the cash payment of RM600,000 to Jamal for the acquisition of the PCB shares *via* a sum of RM500,000 paid to Jamal *via* Affin Bank Cheque No. 023903 dated 18 October 2013 and a further sum of RM100,000 paid to RHB *via* Affin Bank Cheque No. 023908 dated 31 December 2013.

[107] The defendant admitted that he had made the payment of RM600,000 to Jamal as stated above (para. 31 of the statement of agreed facts). Since Jamal promptly placed the proceeds from the first payment into his margin trading account, which was subsequently utilised for the impugned acquisition, it is evident that the purpose of the payment was to finance the acquisition of the PCB shares.

[108] On the second payment, the fact that the defendant made out the cheque to Jamal's margin trading account, which was subsequently utilised to acquire PCB shares, also shows that the purpose of this payment was to finance the acquisition of the PCB shares.

[109] Considering the timing and the money trail, it is undeniable that the RM600,000 cash payment made by the defendant to Jamal was specifically intended to fund the impugned acquisition.

[110] It is important to highlight that the money trail evidence remains uncontroverted. The plaintiff's witnesses were not cross-examined as to the genuineness of the movement of monies from the defendant to Jamal and Jamal to the acquisition of the PCB shares.

[111] There was no evidence led by the defendant to show that the monies to Jamal were for a different purpose. The defendant's pleaded case that the monies were purportedly for the Cherating resort remains an assertion not supported by any sworn evidence.

[112] This is a crucial factor because the assertion forms the defendant's pleaded case, and further, the information is exclusively within the defendant's knowledge. Therefore, his failure to testify or adduce evidence to the contrary justifies the invocation of an adverse inference under s. 114(g) of the Evidence Act 1950 against the defendant. The earlier-quoted passage from the Federal Court case of *Takako Sakao* (*supra*) makes this position clear. The Federal Court also held:

> The other case is *Crawford v. Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the Advice of the Privy Council said:
>
> > *It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.*
> >
> > (emphasis added)

The Defendant's Overdraft Facility

[113] Fifth, the defendant's obtaining and utilisation of the overdraft facility is highly suspicious.

[114] Although the defendant represented to Affin Bank that the purpose of the overdraft facility was to finance the construction of a bungalow, he immediately utilised the overdraft facility to acquire the BMW car in the sum of RM240,894 and made the total payment of RM600,000 to Jamal for the impugned acquisition.

[115] The payment of the purchase price for the BMW through the overdraft facility, rather than a hire-purchase facility as would normally be the case, shows that the defendant anticipated making gains which would come from the impugned acquisition.

[116] Considering the substantial prescribed rate of 7.35% per annum on daily rest, the defendant must have contemplated pursuing the impugned acquisition that could swiftly generate profit to mitigate and repay the RM840,894 withdrawn from the overdraft facility. Failure to do so would result in the defendant bearing high interest repayment. The defendant was also required to service the interest on a monthly basis.

[117] The defendant, as a former banker, would appreciate that the high interest cost of the overdraft facility does not make commercial sense to fund a residential bungalow. He would not have been remiss to inquire about other available financial products before deciding to apply for the overdraft facility. It would have been financially advantageous for the defendant to have taken the Affin Home Build Loan product.

[118] Clearly, the defendant opted for the overdraft facility because he anticipated making substantial gains from his insider trading activities with the PCB shares which would cover the high interest rate cost and the overdraft facility permitted him the flexibility to utilise it for his insider trading activities to fund the acquisition of the PCB shares without having to provide any supporting documents to Affin Bank in order to utilise the funds.

[119] The timing of the defendant's application for the overdraft facility is also significant:

(i) on 20 June 2013, the PKNP Board authorised the defendant to, among other tasks, secure funding for the proposed SCR, engage advisors, and execute necessary actions for it.

(ii) on 15 August 2013, Affin Investment issued a term loan letter of offer of RM160 million to PCB for partially funding the proposed SCR.

(iii) the application for the term loan would have occurred between 20 June 2013 and 15 August 2013. It is noteworthy that the defendant's application for the overdraft facility also fell within this same timeframe.

[120] The defendant's use of the funds for purposes other than intended, combined with the timing of the overdraft facility application aligning with significant events related to the proposed SCR, makes it evident that the defendant deliberately planned to use the funds to finance the impugned acquisition.

Timing And Trading Pattern Of The Impugned Acquisition

[121] Sixth, the timing and trading pattern of the impugned acquisition are also highly suspicious.

[122] The first acquisition of PCB shares by Jamal occurred on 4 October 2013, just one day after the Board of Directors of PKNP had approved the proposed SCR. This is significant as based on Jamal's available trading records in respect of his trading account:

(i) Jamal's last trade prior to the impugned acquisition on 4 October 2013 was almost two years earlier on 18 October 2011. In other words, Jamal had not made any trades at all under his trading account for the past two years before he undertook the acquisition of PCB shares on 4 October 2013.

(ii) furthermore, Jamal had not previously traded in PCB shares in the four-year period between 31 July 2010 until 31 March 2014.

[123] Similarly, the first acquisition of PCB shares under Jamal's margin trading account occurred on 11 October 2013. This is significant as:

(i) Jamal's last trade under the margin trading account prior to the impugned acquisition on 11 October 2013 was more than two years earlier on 25 August 2011. In other words, Jamal had not made any trades at all under the margin trading account for the past two years before he undertook the acquisition of PCB shares on 11 October 2013.

(ii) furthermore, Jamal had not previously traded in shares in PCB under the margin trading account in the five-year period between 31 January 2009 until 31 March 2014.

[124] Jamal's acquisition of shares in PCB on 4 October 2013 and 11 October 2013 was not a one-off transaction. Jamal continued to make regular purchases of PCB shares throughout the months of October 2013 and November 2013, culminating in a substantial amount of PCB shares acquired in the three trading days between 31 December 2013 and 3 January 2014. Details of the acquisition are as follows:

Date (Day)	Status	Trades	% of Total Market Volume of PCB Shares traded on Bursa Malaysia
31.12.2013 (Tuesday)	Trading Day	399,300 shares in PCB acquired	**58.06%**
1.1.2014 (Wednesday)	Public Holiday Non-Trading Day		
2.1.2014 (Thursday)	Trading Day	244,400 shares in PCB acquired	**49.13%**
3.1.2014 (Friday)	Trading Day	327,300 shares in PCB acquired	**8.86%**
6.1.2014 (Monday)	**PCB counter suspended** **Total**	**971,000 shares in PCB acquired**	

[125] As seen from the above table, in these three trading days, 971,000 PCB shares were acquired, equivalent to 68.73% of Jamal's entire shareholding in PCB. The impugned acquisition immediately preceded and/or was in very close proximity with the key events prior to the announcement of the proposed SCR to Bursa Malaysia.

[126] In *The Securities and Futures Commission v. Young Bik Fung & Ors* [2016] HKCU 116, affirmed on appeal in *SFC v. Young Bik Fung & Ors* [2018] 1 HKC 24676, the Hong Kong District Court considered the fact that the defendants had never previously invested such a significant amount in a single stock in determining their liability.

[127] Therefore, I arrive at the conclusion that the defendant's decision to make the announcement on Bursa Malaysia on 6 January 2014 was made before 31 December 2013, taking into account, *inter alia*, the following factors:

(i) prior to the announcement, the necessary documents had to be prepared, for instance, the Directors' Circular Resolution of the subsidiaries to the proposed SCR, the letter dated 3 January 2014 by PKNP to the directors of PCB to request PCB to make necessary application to Bursa for request of suspension for trading in the securities of PCB on 6 January 2014, and PCB's request dated 3 January 2014 to Bursa for a suspension of trading in PCB shares;

(ii) according to PW6, it was the defendant who instructed him and the other directors in the subsidiaries to execute the relevant directors' circular resolution of the subsidiaries for the proposed SCR. They executed the directors' circular resolution on 2 January 2014.

(iii) there were several intervening public holidays and weekend holidays between 31 December 2013 and 6 January 2014, namely 1 January 2014, 4 January 2014, and 5 January 2014;

(iv) the company secretary for the respective subsidiaries should be available to prepare the Directors' Circular Resolution of the subsidiaries to the proposed SCR;

(v) the directors of the subsidiaries should be available to sign the Directors' Circular Resolution on that date;

(vi) there should be consultations with Affin Investment on the offer price of the proposed SCR Offer; and

(vii) there should be notifications and/or communications with the Perak Menteri Besar, the Chairman of the Board of PKNP of the intended date of the announcement and the fixing of the offer price of the proposed SCR offer.

[128] The proposed SCR was a major corporate exercise involving a listed company. It requires careful planning. It is not conceivable that the defendant had just woken up from his bed on the morning of 2 January 2014 and decided to make the announcement of the proposed SCR on 6 January 2014.

[129] PW7's evidence in this regard was wholly unchallenged under cross-examination. The defendant's failure to challenge the evidence of PW7 must be taken as acceptance of PW7's evidence, as per *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770 at p. 796.

Telephone Communications Between The Defendant And Jamal

[130] It is reasonable to conclude that the defendant had communicated to Jamal his decision to make the announcement of the proposed SCR offer on 6 January 2014 prior to the impugned acquisition on 31 December 2013. Telephone records show that the defendant contacted Jamal on 30 December 2013 at 3:32:24pm and 4:53:42pm respectively. Their last telephone communication prior to 27 December 2013 was on 7 December 2013. The call logs show the following:

(i) on 27 December 2013 – more than three minutes of calls;

(ii) on 28 December 2013 – two minutes and three seconds of calls;

(iii) on 30 December 2013 – one minute and 32 seconds of calls. After the defendant's call at 3.32:24pm and 4:53:42pm, Jamal called his remisier at 4.26pm to acquire PCB shares.

[131] The irresistible inference is that Jamal knew when the proposed SCR would be announced because it was part of the arrangement he had with the defendant, which was to jointly acquire the PCB shares or for the defendant to procure Jamal to acquire the PCB shares, whilst in possession of the inside information.

[132] The joint acquisition of the substantial block of PCB shares by the defendant and Jamal between 31 December 2013 and 3 January 2014 were made to take advantage of the impending announcement of the proposed SCR offer on 6 January 2014.

[133] The fact that following the announcement on Bursa Malaysia on 6 January 2014, Jamal's trading account and margin trading account had disposed of all the PCB shares that were acquired during the period 4 October 2013 to 3 January 2014 further supports the inference that the impugned acquisition was made with the knowledge of the inside information. It should also be noted that no other counters in Bursa Malaysia were traded under Jamal's trading account and margin trading account (other than the PCB shares).

Joint Benefit

[134] Seventh, there was joint benefit between the defendant and Jamal.

[135] The defendant and Jamal had jointly benefited from the disposal of PCB shares. This much is clear. Upon receiving payments totalling RM1,418,528.82 from RHB being the sales proceeds and contra gains from the disposal of the PCB shares, Jamal subsequently issued four cheques totalling RM900,730 from the aforesaid proceeds and contra gains received from RHB to the defendant. The defendant has admitted to receiving payment of RM900,730 from Jamal. The aforesaid payment from Jamal resulted in the defendant making a net profit of RM300,730 from the disposal of the PCB shares after taking into account the cash funding of RM600,000 by the defendant for the acquisition of the PCB shares.

[136] Upon receiving the sum of RM900,730 from Jamal, the defendant paid the entire sum of RM900,730 into the overdraft facility account.

Proximity Of Calls And The Impugned Acquisition

[137] Eighth, there is a proximity of calls between the defendant and Jamal relating to the impugned acquisition. By comparing Jamal's trading records with the telephone records of both the defendant and Jamal, it is evident that, out of the 14 total trading days on which the impugned acquisition was executed:

(i) for 11 of those trading days, there were calls between the defendant and Jamal on the day prior to the impugned acquisition;

(ii) for two of the trading days, there were calls between the defendant and Jamal in the two days prior to the impugned acquisition;

(iii) for four of the trading dates, there were calls between the defendant and Jamal on the trading date itself during trading hours; and

(iv) for 15 of the trading dates, on the days after the communication between the defendant and Jamal, Jamal had called/sent SMS to his remisier, Ravindran, which led to the acquisition of the PCB shares.

[138] I find that the usage of telephone communications, in particular, can be used to establish the elements of "possession" of inside information. While not binding precedent in Malaysia, the case of *United States of America, Appellate v. James v. J McDermott, Jr, Defendant-appellant* (US Court of Appeals for the second circuit – 245 F.3d 133) demonstrates how courts have addressed circumstantial evidence in insider trading cases. There, the court held that although the government was unable to produce direct evidence of the content of any conversation during which McDermott transferred material, non-public information to Gannon, rational minds could infer such a conclusion from the evidence of telephone conversations between them that coincided with Gannon's trading activity.

[139] Based on the foregoing, I find that the mosaic of circumstantial evidence, when considered as a whole, leads to the irresistible inference that the defendant had jointly acquired PCB shares with Jamal whilst in possession of the inside information, thereby contravening s. 188(2)(a) of the CMSA.

[140] At this juncture, it is important to note that it has been held in *Lei Lin Thai v. PP* [2016] 7 CLJ 222 at paras. 50 and 51 that a person can acquire securities through the account of a third party and still be liable for insider trading. The agreement that the defendant and Jamal had on their respective portion of the funding for the impugned acquisition and the sharing of the gains is a matters of internal arrangement between the two of them. This does not detract from the fact that the defendant had engaged in insider trading.

The PCB Shares Were Securities Within The Definition Of "Securities" Under The CMSA

[141] It is not disputed nor challenged by the defendant that the PCB shares were "securities" within the meaning of "securities" under the CMSA.

[142] It is an agreed fact that at the material time, PCB was a publicly listed company. The word "securities" is defined under s. 2 of the CMSA to mean as follows:

A "securities" means –

(a) debentures, stocks or bonds issued or proposed to be issued by any government;

(b) **shares in or debentures of, a body corporate or an unincorporated body;** or

B

(c) units in a unit trust scheme or prescribed investments,

and includes any right, option or interest in respect thereof
(emphasis added)

[143] Thus, the PCB shares were clearly securities within the meaning of
C s. 2 of the CMSA.

Alternative Claim – Whether The Defendant Had Procured Jamal To Acquire PCB Shares

[144] Although I have found that the defendant had jointly acquired PCB
D shares with Jamal, I will, for completeness, address the alternative claim that the defendant had procured Jamal to acquire the PCB shares.

[145] The term "procure" is defined in s. 187 of the CMSA as follows:

For the purposes of this Subdivision and section 201 but without limiting the meaning of the term "procure" as provided in this section, if a person
E incites, induces, encourages or directs an act or omission by another person, the first-mentioned person is deemed to procure the act or omission by the other person.

[146] Based on the evidence adduced, I find that the defendant had communicated the inside information to Jamal and provided funding to
F Jamal, which enabled Jamal to acquire the PCB shares. The provision of funds from the defendant to Jamal is a form of procurement as it is a direct form of incitement, inducement, encouragement, or direction within the meaning of s. 187 of the CMSA. This is because funds are a form of enabler for the acquisition of PCB shares as compared to mere words when a
G procurer provides a direction or persuasion.

[147] Therefore, even if I am wrong in finding that the defendant had jointly acquired PCB shares with Jamal, I would still find that the defendant had procured Jamal to acquire the PCB shares in contravention of s. 188(2)(b) of the CMSA.

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The Defendant's Submission Of No Case To Answer

[148] The defendant submitted that there is no case to answer. The consequence of this election is that the defendant refuses to give evidence. In such a situation, the court is entitled to draw an adverse inference against
I the defendant and to presume the plaintiff's evidence to be true (*Takako Sakao* (*supra*)).

[149] In the present case, the failure of the defendant to give evidence discredits his case and strengthens the plaintiff's case on those vital points at the axis of the dispute between the parties, namely:

(i) the purpose and timing of the defendant's payment to Jamal and *vice versa*;

(ii) the issuance of the RM100,000 cheque by the defendant to RIB;

(iii) the defendant's trading *modus operandi*;

(iv) the defendant's reason for not stating in his application for the overdraft facility that the purpose of the facility was for his alleged investment in Cherating Resort;

(v) why the defendant had applied for the overdraft facility when the Affin Home Build product was a cheaper option and catered specifically for the purpose of his application;

(vi) when the defendant's bungalow was built and by what means;

(vii) the improbability that the payment to Jamal had anything to do with his investment in Cherating Resort; and

(viii) the proximity of the phone calls between the defendant and Jamal and Jamal's trades in PCB shares.

[150] These are all vital matters within the knowledge of the defendant, which required an explanation from the defendant. The defendant's failure to give evidence means that the court is entitled to draw an adverse inference against him on each and every one of these issues (*Takako Sakao* (*supra*)).

[151] In the case of *Solsis (M) Sdn Bhd v. Kenny Woo B'ng Tat & Anor* [2019] CLJU 2173; [2019] 1 LNS 2173; [2020], it was held that when the defendant submits "no case to answer", the plaintiff's burden of proof is said to be lower than the balance of probabilities. The court must assess the plaintiff's evidence to determine if the claim has a reasonable chance of success and held as follows:

> [91] As can be seen disclosed in *Benham Ltd*, the standard applicable is somewhat different when a submission of no case to answer is made, and which is invariably made, without the benefit of any evidence tendered by the defendant. In such a situation, there is no countervailing evidence for the court to weigh and thus no preponderance of evidence to speak of. The court would have heard only one side's evidence. *What the court can determine is only whether upon the evidence adduced by the plaintiff, documents admitted into evidence and the cross-examination of the plaintiff's witnesses, a prima facie case against the defendant has been established or as put by Simon Brown LJ in Benham Ltd, 'whether or not the claim has a reasonable prospect of success'.*

> [92] Having regard to the evidence led by the plaintiff, the cross-examination of the plaintiff's witnesses, the documents that were led into evidence including the correspondences between the plaintiff and Facilipack, some of which were signed by the defendants, *I am of the view that the plaintiff had indeed established a prima facie case to which the defendants must answer if the plaintiff's case was to be rebutted.* The evidence led by the plaintiff quite clearly, to my mind, established a *prima facie* case against the defendants for the amounts claimed. (emphasis added)

[152] In this regard, the defendant's cross-examination of the plaintiff's witnesses had no effect in advancing the defendant's defences or discrediting the plaintiff's case. The plaintiff's witnesses withstood cross-examination and consistently maintained their positions in support of the plaintiff's case, particularly, PW6 and PW7, who are material witnesses.

[153] Therefore, I find that, despite the ruling in *Solsis* (*supra*), even if the higher standard of proof of "balance of probabilities" is applied, the plaintiff has successfully proven its case against the defendant for violating s. 188(2)(a) or (b) of the CMSA.

The Defendant's Defences

[154] Before addressing the defendant's defences, some of which have already been dealt with earlier in this judgment, it is important first to highlight the effect of a "no case to answer" submission on the defendant's pleaded defence. In *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2009] 10 CLJ 234 the court held as follows:

> [23] In a submission of no case to answer, **the defences pleaded are not under consideration.** To put it bluntly, on such an occasion the defendant is actually saying that it **need not bother to offer and lead any evidence on any of the pleaded defences** because the plaintiff's case is bad as it has not been made out and ought therefore to be dismissed without more. It is still the plaintiffs case that is scrutinised for the sole purpose of establishing whether the defendant has made a right submission. If the submission is properly taken on the law and on the facts, then the plaintiffs case would be dismissed. However, where the defendant fails in its submission and the plaintiff succeeds in discharging the burden of proof, the plaintiffs case will be allowed. **That is why it is said that the defendant will stand or fall by the submission.** (emphasis added)

[155] Nevertheless, for completeness, I shall address the defences raised by the defendant below.

[156] First, the defendant contended that Jamal was a very senior ranking member of PKNP and PCB senior management and therefore had personal access to the inside information. The defendant relied on the attendance sheet of the Board of Directors Meeting on 3 October 2013, which purportedly showed Jamal's name and signature on the attendance list, to argue that Jamal had knowledge of the proposed SCR without the defendant having to communicate the same to him.

[157] As explained earlier, the minutes of the 3 October 2013 board meeting, which is a Part A document, clearly show that Jamal was not present at the meeting. PW6 explained that a person can sign the attendance list without necessarily attending the meeting. Moreover, the defendant himself had stated in his s. 134 statement that Jamal was not involved in the proposed SCR.

[158] Second, the defendant attempted to rely on an email dated 3 January 2014 that was copied to Jamal to argue that Jamal was kept in the loop regarding the proposed SCR. However, as explained by PW7, this email was not about the privatisation of PCB but about the request for the suspension of PCB's securities in Bursa Malaysia. Furthermore, the email was sent on 3 January 2014 at 5.04pm, when Jamal had already acquired all the PCB shares and the market had already closed.

[159] Third, the defendant contended that the monies paid by him to Jamal and *vice versa* were for investment in the Cherating Bayview Resort. However, the defendant has not adduced any evidence to support this contention. The timing of the payments, the absence of any documentary evidence to support the alleged investment in Cherating Resort, and the fact that the defendant had previously traded in SIGGAS shares through Jamal, all of which point to the inference that the payments were related to the impugned acquisition.

[160] Fourth, the defendant argued that the profit-sharing ratio between him and Jamal does not indicate insider trading. The defendant pointed out that Jamal, who put in an investment of RM71,000 cash, made a profit of RM1.4 million, whereas the defendant, who allegedly gave RM600,000 to Jamal, made a profit of only RM300,000. The defendant argued that if he had indeed been the mastermind of the whole exercise, he would have made the RM1.4 million and not Jamal.

[161] I find this argument to be without merit. The profit-sharing ratio between the defendant and Jamal is an internal arrangement between them. It does not detract from the fact that the defendant had engaged in insider trading. The defendant's investment of RM600,000 in the impugned acquisition yielded a return of RM300,730, which is a substantial return on investment.

[162] Fifth, the defendant contended that the non-calling of Jamal as a witness by the plaintiff gives rise to an adverse inference under s. 114(g) of the Evidence Act 1950. I find this argument to be without merit. The non-calling of Jamal as the plaintiff's witness does not give rise to an adverse inference under s. 114(g) of the Evidence Act 1950. PW7 had explained that the plaintiff would not be calling Jamal to give evidence as Jamal had taken a stance in the regulatory settlement entered with the plaintiff, to neither admit nor deny the claim made against him in respect of the impugned acquisition.

[163] In *Techbay Sdn Bhd & Ors v. Medicbilt Sdn Bhd & Another Appeal* [2019] CLJU 361; [2019] 1 LNS 361; [2019] 5 MLJ 754, the Court of Appeal affirmed that the adverse inference under s. 114(g) of the Evidence Act should not be invoked where the potential witness is unlikely to give evidence that will incriminate him. The Court of Appeal held as follows:

> [87] The learned trial judge's finding was therefore amply supported by the evidence. In the circumstances, we find no reason to disturb his finding of fact on this issue. *We agree with the defendants' explanation that the reason why they did not call Datuk Bung Mokhtar to give evidence was because Datuk Bung Mokhtar would never admit to receiving the lobbying fees, and not because they wanted to suppress evidence.*
>
> [88] *The learned judge was right in the circumstances in not invoking adverse inference under s. 114(g) of the Evidence Act 1950 against the defendants for not calling Datuk Bung Mokhtar,* bearing in mind the invocation of the provision is at the discretion of the trial court. (emphasis added)

[164] I find that a contravention of insider trading provisions under the CMSA attracts criminal sanctions. Jamal has every reason not to incriminate himself by admitting that he had contravened these insider trading provisions, irrespective of the truth.

[165] Furthermore, a mere omission to call a witness is not in itself sufficient for the invocation of s. 114(g) of the Evidence Act 1950. There must be a conscious withholding or suppression of evidence. A party cannot raise the presumption of adverse inference if he himself was at liberty to call the witness to give evidence (by subpoena if necessary).

[166] In *Chan Soon Huat* (*supra*), it was held as follows:

> [140] The defendant too submitted that without the calling of WCT's directors, this meant adverse inference under s. 114(g) of the Evidence Act 1950 should be applied against the plaintiff. *This court is not minded to find adverse inference should be drawn under this provision against the plaintiff as it cannot be said that there was conscious withholding or suppression of evidence. Further, if a party himself is at liberty to call any witness including by subpoena, adverse inference cannot be levelled against the other party.* See *Krishnan Nambiar s/o Perabakaran & Ors v. Dr P Mahendran & Anor* [2009] 4 MLJ 267 and *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 MLJ 492. (emphasis added)

[167] In the present case, the defendant was at liberty to call Jamal as a witness but chose not to, despite their close relationship. Furthermore, given the defendant's defences which involve Jamal, it is his responsibility to call Jamal to testify in support of his position. As such, the defendant cannot now raise the presumption of adverse inference against the plaintiff for not calling Jamal.

Effect Of The Regulatory Settlement With Jamal

[168] Sixth, the defendant contended that the regulatory settlement entered into between Jamal and the plaintiff has an impact on his liability. I find this argument to be without merit.

[169] A joint acquisition of securities by persons in possession of inside information is simply a commercial arrangement employed by two or more persons to misuse or exploit inside information. In so far as statutory liability is concerned, each one of them has independently and separately committed an offense under s. 188(2)(a) of the CMSA.

[170] Once s. 188(2)(a) of the CMSA is triggered, s. 201(5) or s. 201(6) of the CMSA comes into play. Section 201(5)(a) outlines the statutory formula for the payment of a pecuniary sum by a person who has violated s. 188 of the CMSA. Nothing in this section stipulates the statutory formula, specifically, the three times pecuniary relief for offenders in the same transaction, is to be apportioned. Nor does it state that any payment received by the Securities Commission from another offender in the same transaction should be utilised or applied to reduce the three times pecuniary relief owed by the other offender.

[171] The statutory provisions in s. 188(2)(a) of the CMSA read with s. 201(5)(a) of the CMSA are clear and unambiguous and must be given effect. As such, the regulatory settlement entered into between Jamal and the plaintiff does not affect the defendant's liability.

Doctrine Of Laches

[172] Seventh, the defendant contended that the plaintiff is prohibited by the doctrine of laches from making any claim against him. I find this argument untenable.

[173] The defendant has not even established that there are laches on the part of the plaintiff. The time taken by the plaintiff for investigation does not amount to delay or laches.

[174] In any case, in *Fisher v. Brooker* [2009] 4 All ER 789 at para. 79, the House of Lords has emphatically rejected the argument that the defence of laches extends to a statutory right:

> [79] The argument based on laches faces two problems. The first is that, as pointed out by David Richards J, laches only can bar equitable relief, and a declaration as to the existence of a long-term property right, recognised as such by statute, is not equitable relief. It is arguable that a declaration should be refused on the ground of laches if it was sought solely for the purpose of seeking an injunction or other purely equitable relief. However, as already mentioned, that argument does not apply in this case. Secondly, in order to defeat Mr Fisher's claims on the ground of laches, the respondents must demonstrate some 'acts' during the

A course of the delay period which result in 'a balance of justice' justifying the refusal of the relief to which Mr Fisher would otherwise be entitled. For reasons already discussed, the respondents are unable to do that. They cannot show any prejudice resulting from the delay, and, even if they could have done so, they have no answer to the judge's finding at [2007] FSR 255 at [81], that the benefit they obtained from the delay
B would outweigh any such prejudice.

[175] The Singapore Court of Appeal, in *eSys Technologies Pte Ltd v. Tan Corporate Advisory Pte Ltd* [2013] SGCA 27, reaffirmed that the doctrine of laches applies exclusively to claims in equity. Since the plaintiff's claim is statutory, laches is not applicable.
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[176] In any event, the defendant has not shown any prejudice resulting from the alleged delay. Further, this defence was also not put to the plaintiff's witnesses, particularly PW7, during cross-examination.

The Election Argument

D **[177]** Eight, the defendant's argument on the election point, which was raised for the first time during trial, is that the plaintiff would cause prejudice to the defendant by pursuing alternative claims under s. 188(2)(a) and s. 188(2)(b) of the CMSA. The defendant contends that the plaintiff should be required to choose between alleging that the defendant acquired securities
E jointly with Jamal or that the defendant procured Jamal to acquire securities.

[178] However, I find that no election between alternative claims is required at the pleading stage. Order 18 r. 10(2) of the Rules of Court 2012 expressly permits an action to be brought on alternative claims. Both claims arise from the same underlying facts but represent different legal characterisations of
F those facts.

[179] A claim in the alternative sets forth multiple claims such that if one claim fails, the other claims should still be considered. The authorities including *Tang Man Sit v. Capacious Investment Ltd* [1996] 1 All ER 193 (Privy Council), *Bagot v. Easton* (1877) 7 Ch D 1 and *Ng Chee Weng v. Lim*
G *Jit Ming Bryan & Anor* [2011] SGCA 62 establish that a claimant is not required to elect between alternative claims until judgment, and only when seeking inconsistent remedies. Since there is no inconsistency in the underlying facts pleaded in paras. 1 to 39 of the statement of claim, and the
H remedies sought are not inconsistent, no election is required. It is for the court to determine at the conclusion of the trial whether a case has been made out under s. 188(2)(a) or alternatively s. 188(2)(b) of the CMSA. The defendant's election point is therefore without merit.

Conclusion On Liability

I **[180]** Based on the foregoing, I find that the defendant was an "insider" within the meaning of s. 188(1) of the CMSA and that he had jointly acquired PCB shares with Jamal whilst in possession of inside information, thereby contravening s. 188(2)(a) of the CMSA.

[181] I find overwhelming and unchallenged evidence that the defendant has contravened s. 188(2)(a) of the CMSA. Consequently, in the alternative, it is unnecessary to establish, that the defendant induced Jamal to acquire PCB shares in violation of s. 188(2)(b) of the CMSA.

Reliefs

[182] Having found the defendant liable for insider trading, I shall now address the reliefs to be granted to the plaintiff.

Three Times Pecuniary Relief Under S. 201(5)(A) Of The CMSA

[183] Under s. 201(5)(a) of the CMSA, the plaintiff is entitled to recover an amount equal to three times being the difference between the price at which the PCB shares were acquired by the insider and the price at which they would have been likely to have been acquired of at the time of the impugned acquisition if the inside information had been generally available.

[184] In *Sreesanthan Eliathamby* (*supra*) the High Court adopted the closing price of Worldwide's shares on the trading day immediately following the suspension of trading as the price to be considered, alongside the price at which the defendant acquired the shares. It was held at para. 200 as follows:

> In this case, the closing price for the Worldwide shares on the trading day immediately following the suspension of trading was RM3.20. It was advanced for the plaintiff that this was the price that the shares would have been on the days on which the defendant acquired the Worldwide shares, had the information relating to the proposed privatisation been generally available on the days that the trades in the Worldwide shares were effected in the defendant's account. I saw no reason to disagree.

[185] Similarly, the same approach was adopted in *Securities Commission Malaysia v. Toh Kai Fatt* [2023] 9 CLJ 130; [2023] 10 MLJ 670:

> [221] PW6 testified that the difference between the price at which the securities were acquired by the defendant, and the price at which they would have been likely to have been acquired at the time of the acquisition, if the information had been generally available, as stipulated in s. 201(5) of the CMSA is RM787,707.50 ('theoretical gain'). The price at HPI shares would have been likely to have been acquired at the time of the acquisition, if the information had been generally available is based on the share price of RM4.18 per HPI share on 16 June 2011. The use of RM4.18 per HPI share by reference to the closing price on 16 June 2011 was not challenged by the defendant's counsel.
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> ...
>
> [226] Therefore, the plaintiff is entitled to claim for the sum of RM2,363,122.50 claimed in para 50(b) of the statement of claim, being three times the theoretical gain of RM787,707.50.
>
> [227] In *Suruhanjaya Sekuriti Malaysia v. Sreesanthan Eliathamby* [2021] 11 MLJ 827 (HC) at para. 200(b), the factor of three was also applied to the gain.

[186] Therefore, the plaintiff is entitled to claim the sum of RM2,363,122.50 claimed in para. 50(b) of the statement of claim, three times the theoretical gain of RM787,707.50.

[187] In *Sreesanthan Eliathamby* (*supra*) at para. 200(b), "the factor of three was also applied to the gain".

[188] In *Chan Soon Huat* (*supra*), after reviewing the relevant authorities, the court acknowledged that there are several methods for determining the three times pecuniary relief under s. 205(1)(a) of the CMSA. The High Court accepted that one such method for determining the likely price at which the securities would have been acquired or disposed of, had the inside information been publicly available, is by referencing the market price of the securities following public disclosure. The High Court held at para. 152 as follows:

> [152] Judicial decisions have recognised that **the market price of a security after public disclosure of the relevant material information, can represent the 'true' value of the security,** for purposes of assessing damages for insider trading or fraudulent market activities. (emphasis added)

[189] The prevailing approach in Malaysian courts is to use the market price of the security, following the public disclosure of material non-public information, as the likely price at which the security would have been acquired or disposed of if the material information had been publicly available.

[190] The detailed computation of the plaintiff's claim for RM2,466,229 has been set out by the investigating officer (PW7) in his answer to question 78 in the witness statement, which is in summary as follows:

(i) the closing price of PCB's shares on 7 January 2014 is RM3.62.

(ii) the price of the PCB shares when they were jointly acquired by the defendant and Jamal are as follows:

Date of Transaction	Shares Acquired (unit)	Unit Price (RM)	Net Gain* (RM)
4.10.2013	20,000	2.8950	57,900.00
7.10.2013	600	2.8900	1,734.00
10.10.2013	20,000	2.9050	58,100.00
11.10.2013	12,600	2.8979	36,513.54
14.10.2013	58,800	2.9386	172,789.68
17.10.2013	16,700	2.9997	50,094.99
21.10.2013	14,000	3.0993	43,390.20

29.10.2013	39,800	3.1000	123,380.00
31.10.2013	59,300	3.0984	183,735.12
1.11.2013	109,900	3.0936	339,986.64
4.11.2013	90,000	3.0800	277,200.00
31.12.2013	399,300	2.9295	1,169,749.35
2.1.2014	244,400	3.0264	739,652.16
3.1.2014	327,300	3.1704	1,037,671.92
Total	1,412,700		4,291,897.60

* The Net Gain is derived by deducting the brokerage fees and charges from the gross proceeds of sale.

(iii) total net gain derived from the impugned acquisition:

(1,412,700 x RM3.620) – RM4,291,897.60 = RM822,076.40

(iv) when the sum of RM822.076.40 is multiplied by three, the final sum is RM2,466,229.20.

[191] Similar to the case of *Toh Kai Fatt* (*supra*), the computation as provided by PW7 was not challenged by the defendant during cross-examination.

[192] Accordingly, I find that the plaintiff is entitled to the sum of RM2,466,229.20 as the pecuniary relief that the defendant shall pay the plaintiff pursuant to the statutory formula of s. 201(5)(a) of the CMSA.

Civil Penalty Under S. 201(5)(b) Of The CMSA

[193] With respect to the civil penalty under s. 201(5)(b) of the CMSA, I am of the view that the maximum penalty of RM1 million should be imposed upon the defendant based on aggravating considerations stated below.

[194] First and foremost, insider trading is a grave offense, recognised as a serious form of financial misconduct. Such offences can potentially undermine the integrity of Malaysia's capital markets. If investors, both local and foreign, perceive the markets as unreliable due to unchecked insider trading, confidence in the system will erode, ultimately affecting the broader economy. This underscores the need for strict punitive measures and deterrent penalties to safeguard market integrity.

[195] This principle was duly recognised and given appropriate consideration in *R v. Glynatsis* [2012] NSWSC 1551 where the New South Wales Supreme Court held at pp. 27 to 28:

A [139] *Insider trading offences are regarded as a serious form of criminal activity.* They serve to undermine the integrity of the stock market: *R v. Doff* [2005] NSWSC 50; 23 ACLC 317 at [40]. The offences are difficult to detect: *R v. Rivkin* [2003] NSWSC 447; 198 ALR 400 at 409.410 [44].

B [140] General deterrence is important in the sentencing process *to provide a firm disincentive to insider trading, and with a need to sound "a clarion call" to discourage illegal and unethical behaviour by persons who are in a position to offend in this way: R v. Rivkin* at 409-410 [44]; cf *R v. Doff* [2005] NSWCCA 119; 54 ACSR 200 at 212

C [141] *Insider trading not only has the capacity to undermine the integrity of the market, it also has the potential to undermine aspects of confidence in the commercial world generally arising from breaches of trust: Hartman v. R* [2011] NSWCCA 261 at [94].

...

D [143] *Insider trading is not a form of victimless crime,* and it is a form of cheating: *R v. Hartman* [2010] NSWSC 1422 at [45], [94]; *Hartman v. R* at [94]; *R v. Bateson* [2011] NSWSC 643 at [15]-[21]. (emphasis added)

[196] In *Finkelstein v. Ontario (Securities Commission)* [2018] OJ No. 489, the Ontario Court of Appeal held as follows:

E 23 First, *an important premise of securities law is that all investors and prospective investors ought to be given access to material information about securities so that prospective purchasers can value them accurately and make informed investment decisions: Danuke (Re)* (1981), 2 OSCB 31C, at p. 40C. Any information about an issuer that likely would affect the market value of the issuer's securities should be available on an equal basis to all potential investors: Jeffrey MacIntosh and Christopher Nicholls, Securities Law (Toronto:
F Irwin Law, 2002), at p. 225. As put by the OSC in *Woods (Re)*: *"It would be grossly unfair to permit a person who obtains undisclosed material information with respect to a reporting issuer because of his relationship with the issuer to trade with the informational advantage this gives him or her."*

G 24 *A second rationale concerns the risk that insider trading will undermine investor confidence in the capital markets. If prospective investors have reason to fear insiders will be free to trade on the basis of undisclosed information, they might refuse to purchase securities: MacIntosh and Nicholls,* at p. 229. The OSC has described insider trading as "a cancer that erodes public confidence in the capital markets": *M.C.J.C. Holdings (Re),* (2002), 25 OSCB 1133; *Donnini (Re),* (2002), 25 OSCB 6225, at para. 202.

H 25 Finally, a principle of Canadian securities regulation is that *markets operate efficiently on the basis of timely and full disclosure of all material information.* Prohibitions against insider trading and tipping in the absence of full disclosure support this principle: Illegal Insider Trading in Canada: Recommendations on Prevention, Detection and Deterrence, Insider
I Trading Task Force, November 2003 ("Task Force Report"), at p. 3. (emphasis added)

[197] In *Sreesanthan Eliathamby* (*supra*), the court imposed the maximum penalty of RM1 million on the defendant, deeming it necessary to uphold investor's confidence in the capital markets, as stated in para. 200(c)(iii):

> it was necessary, in the interest of justice and in order to preserve and maintain confidence in the fairness and integrity of the securities markets, for financial services professionals (like the defendant) be held to the highest standards of good conduct. The defendant in this case not just an advocate and solicitor but also a professional who provided legal services to the financial sector.

[198] Second, the defendant, as a "corporate insider", had access to inside information by virtue of his role as the CEO of both PKNP and PCB. He abused the trust placed in him by the company (PCB) and the statutory body (PKNP) to unlawfully profit through insider trading. Such a blatant disregard for corporate integrity necessitates strict punitive measures.

[199] Similarly, in *Sreesanthan Eliathamby* (*supra*), the court imposed the maximum penalty of RM1 million on the defendant, a lawyer who advised Worldwide on the corporate exercise and was therefore considered a "corporate insider". The court held as follows:

> (i) the defendant, as an advocate and solicitor of the High Court of Malaya, was expected to uphold the highest standards of integrity and honesty. As a seasoned corporate lawyer, and by some accounts the leading corporate lawyer of his generation, the defendant ought to have known better than to betray the duty of confidence that was emplaced upon him by the financial advisors of the privatisation exercise; ...

[200] Third, the defendant's background is a significant factor. He held prominent positions in the insurance industry and served as both CFO and later CEO of Malayan Banking Berhad, one of Malaysia's largest banks. Far from being ordinary, he was a highly educated professional with a deep understanding of financial regulations. Despite this, he knowingly engaged in insider trading for personal gain, fully aware of its illegality and ethical implications.

[201] Accordingly, I impose the maximum penalty of RM1,000,000 on the defendant, as I find it proportionate to the severity of his misconduct.

Prohibition From Holding Positions In Public Listed Companies And Restraint From Trading In Any Counter In Bursa Malaysia

[202] Section 360(1)(a)(L) of the CMSA reads as follows:

> Where –
>
> (a) on an application by the Commission, it appears to the court that –
>
> (i) there is reasonable likelihood that any person will contravene a relevant requirement;

(ii) any person has contravened a relevant requirement; or

(iii) any person has contravened a relevant requirement and that there are steps which could be taken to remedy the contravention or to mitigate the effect of such contravention, including making restitution to any other person aggrieved by such contravention,

whether or not that person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution;

...

the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:

...

(B) *an order restraining a person from dealing in securities or dealing in derivatives in respect of any class of securities or derivatives mentioned in the order;*

...

(L) in a case where the person is a chief executive or director, an order removing him from office *or that he be barred from becoming a chief executive, director or be involved in the management directly or indirectly, of any other public company for such period of time as may be determined by the court;* (emphasis added)

[203] Having determined the defendant's liability for insider trading, I find it necessary to impose a prohibition order to safeguard the investing public and uphold confidence in the capital markets.

[204] The plaintiff has sought a prohibition period of five years, or such duration as the court may determine, barring the defendant from holding positions in publicly listed companies and restricting him from trading in any securities or derivatives on Bursa Malaysia.

[205] Given the seriousness of the contravention, the defendant's status as a corporate insider and the need to deter similar misconduct, I find a five-year prohibition period to be appropriate.

Conclusion

[206] For the reasons set out above, I allowed the plaintiff's claim and granted the following orders:

(i) a declaration that the defendant had breached s. 188(2)(a) of the CMSA;

(ii) that the defendant pays the sum of RM2,466,229.20;

(iii) that the defendant pays a civil penalty of RM1,000,000;

(iv) that the defendant be barred from becoming a Chief Executive Officer or Director of any public listed company and/or any subsidiary of a public listed company, for a period of five years from the date of this judgment under s. 360(1)(a)(L) of the CMSA;

(v) that the defendant be barred from being involved in the management of any public listed company and/or any subsidiary of a public listed company, whether directly or indirectly, for a period of five years from the date of this judgment under s. 360(1)(a)(L) of the CMSA;

(vi) that the defendant is restrained, whether by himself, his agent or otherwise howsoever, from trading in any counter on Bursa Malaysia for a period of five years from the date of this judgment;

(vii) that the defendant pays interest at the rate of 5% per annum on the judgment sum from the date of judgment to full realisation thereof; and

(viii) that the defendant pays the cost of RM100,000 subject to the payment of the allocator fee.